

STATE OF MICHIGAN
COURT OF APPEALS

ROCKWELL MEDICAL TECHNOLOGIES,
INC.,

UNPUBLISHED
March 18, 2004

Plaintiff/Counter Defendant-
Appellee,

v

No. 241023
Wayne Circuit Court
LC No. 00-030843-CK

GARY D. LEWIS and WALL STREET
PARTNERS, INC.,

Defendants/Counter Plaintiffs/
Third Party Plaintiffs-Appellants,

and

ROBERT L. CHIOINI and THOMAS E.
KLEMA,

Third Party Defendants.

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendants Gary Lewis and Wall Street Partners, Inc. (“WSP”) appeal as of right from a judgment in favor of plaintiff, Rockwell Medical Technologies, Inc. (“Rockwell”). We affirm as to the breach of contract claim against WSP, but reverse and remand for a new trial as to the breach of fiduciary claim against Lewis.

I

First, Lewis and WSP argue that the trial court erred by denying Lewis’ motion for a directed verdict or judgment notwithstanding the verdict (JNOV) with regard to the breach of

fiduciary duty claim.¹ We disagree because, viewing the evidence in a light most favorable to Rockwell, *Sniecinski v Blue Cross & Blue Shield of MI*, 469 Mich 124, 131; 666 NW2d 186 (2003), there was sufficient evidence to establish this claim. In particular, there was evidence from which the jury could have rejected Lewis' position that the June 1998 extension of the consulting agreement was ratified by approval of independent directors, because the jury could have accepted Robert Chioini's testimony that he did not vote for that extension. Because Norman McKee was the only other arguably independent director as to that agreement, Chioini's vote was necessary for a majority of the two arguably independent directors to ratify the agreement. While Lewis and WSP argue that Chioini's testimony in this regard was not credible, the jury was free to accept (or reject) witness testimony. See *City of Detroit v Larned Assoc*, 199 Mich App 36, 42; 501 NW2d 189 (1993). Thus, there was sufficient evidence for the jury to conclude that at least with regard to the June 1998 extension of the consulting agreement, Lewis was not protected against the breach of fiduciary duty claim by ratification by independent directors pursuant to MCL 450.1545a(1)(b) and (2).

The jury could further have reasonably determined that Lewis did not show that the transaction was fair to Rockwell when entered into so as to protect Lewis from a breach of fiduciary duty claim under MCL 450.1545a(1)(a). If the jury accepted Lewis' position regarding the consulting agreement, then the agreement provided for payments to WSP of \$25,000 a month, even when WSP performed no work for Rockwell. A rational jury reasonably could have concluded that such an arrangement was not fair to Rockwell. Accordingly, the evidence supported a finding that Lewis did not establish the applicability of the statutory "safe harbors" against a breach of fiduciary duty claim.²

A corporate director or officer is required to perform his or her duties in that role in good faith, with the care of an ordinarily prudent person in such a position, and in a manner reasonably believed to be in the best interests of the corporation. MCL 450.1541a(1). A corporation may sue a director or officer for breach of these fiduciary duties. See *Estes v Idea Engineering & Fabrications, Inc*, 250 Mich App 270, 285; 649 NW2d 84 (2002) (noting that "a plaintiff in a [MCL 450.1541a] action is a corporation suing for breach of a duty to the corporation or a shareholder suing derivatively on behalf of the corporation"). Accepting Chioini's testimony, the jury could reasonably have determined that, with regard to the June 1998 extension of the consulting agreement, Lewis and WSP were taking a substantial amount of money from Rockwell without providing any services in return. The evidence enabled the jury to reasonably determine that this course of action was not performed in good faith, with reasonable care for Rockwell's interests, or reasonably believed by Lewis to be in Rockwell's best interest. Also, it is apparent that the jury could properly find that Rockwell suffered damages by paying a

¹ Although appellants' statement of the question presented also refers to the trial court's denial of their motion for summary disposition, their arguments rely only on the evidence presented at trial and, thus, only fairly present the questions of whether the trial court erred by denying their motions for a directed verdict or JNOV.

² We note that MCL 450.1545a(1)(c) is plainly inapplicable because there is no indication that the consulting agreement was submitted to a vote of the shareholders.

consulting fee in return for no services. Thus, there was sufficient evidence for the jury to find a breach of fiduciary duty by Lewis.³

II

Lewis and WSP argue that Rockwell's claims should have been barred based on waiver or estoppel. We disagree. As we understand their argument regarding waiver, Lewis and WSP contend that Rockwell waived any right to reduce payments to WSP for partial periods of work based on the parties' course of conduct. To establish a waiver or modification of a contract, a party must show "a mutual intention of the parties to waive or modify the original contract." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). Such a mutual modification of a contract may be shown by clear and convincing evidence of "affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Id.* at 373. Significantly, Lewis was both chairman of the board of directors of Rockwell and in control of WSP at the relevant times. MCL 450.1545a(2), by effectively discounting the vote of an interested director on a transaction, reflects a policy of not allowing such directors to make decisions on behalf of a corporation with regard to a transaction in which they are interested. Accordingly, the jury could reasonably determine that payments made from Rockwell's funds to WSP at Lewis' direction did not waive Rockwell's right to later challenge those payments as excessive or otherwise inappropriate, because they did not involve an appropriate decision by Rockwell to waive contractual rights. To hold otherwise would countenance a leading corporate officer to obtaining funds in self-interested transactions and then effectively relying on his or her own conduct in doing so as waiving the corporation's right to recover such funds. We regard this as an untenable result.

Similarly, the trial court did not err by declining to direct a verdict against Rockwell based on the doctrine of equitable estoppel. This doctrine requires in part that the party invoking it have *justifiably* relied on another party's act or omission. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998). The jury could reasonably have determined that Lewis and WSP could not justifiably rely on payments made at Lewis' direction as precluding Rockwell from challenging the appropriateness of those payments.

³ We recognize that Rockwell ironically argues on appeal that a general claim of breach of fiduciary duty was not litigated below, but only a claim for excessive compensation. In fact, Rockwell set forth a claim of breach of fiduciary duty in its complaint that was not limited to a claim of excessive compensation. Further, the trial court's instructions to the jury regarding breach of fiduciary duty did not limit its consideration of that claim against Lewis to an excessive compensation claim. Thus, a general claim of breach of fiduciary duty was presented to the jury. In light of our analysis that there was sufficient evidence to support such a claim, we need not decide whether there was sufficient evidence to support a claim of excessive compensation under MCL 450.1545a(4).

III

Lewis and WSP argue in effect that the trial court erred by denying a directed verdict in favor of WSP on the breach of contract claim. We disagree. The pivotal contractual language provides:

Rockwell will pay [WSP] \$25,000 per month (*which amount will be prorated for any partial periods worked based on a five business day week*). All amounts are payable in U.S. funds on the last day of the month, in arrears. [Emphasis added.]

It is arguable that this language clearly and unambiguously provided for reduced payments to WSP for any month in which WSP did not continuously work the equivalent of the typical five-day work week, i.e., forty hours a week, for Rockwell. See *Wausau Underwriters Ins Co v Ajax Paving Industries, Inc*, 256 Mich App 646, 650; 671 NW2d 539 (2003) (clear, unambiguous, and definite language in a contract must be enforced as written). If so, from Chioini's testimony indicating that WSP performed little or no work for Rockwell, the jury could have determined that its receipt of full payment during the relevant times constituted a breach of contract.

However, if the language is regarded as ambiguous, the jury could readily have determined that interpreting it as requiring reduced payment for any times WSP worked less than the equivalent of a standard work week for Rockwell was on its face the most reasonable interpretation of the contract language. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003) (meaning of ambiguous contract is a question of fact for the jury). Contrary to the argument of Lewis and WSP, such an interpretation plainly would not have made it "impossible" for WSP to provide consulting services to other clients as allowed by paragraph three of the consulting agreement. Indeed, that WSP was allowed to provide such services to other clients seems consistent with WSP not being entitled to be continuously paid as if it were working for Rockwell on a full-time basis. Also, while evidence of the parties' course of performance was relevant evidence to present to the jury, *id.* at 474, it does not remove from the jury the role of interpreting ambiguous contractual language. Particularly under the facts of the present case, the jury reasonably could have determined that the course of performance was not relevant to the parties' understanding in agreeing to the initial contract before performance began, but that it should be considered as part of the parties' understanding with regard to the extensions of the contract. This might explain, at least in part, the jury's decision to award Rockwell considerably less than the amount of damages it sought in connection with the breach of contract claim.⁴ Accordingly, whether the contract language at issue is viewed as ambiguous or unambiguous, the trial court did not err by denying WSP's motion for a directed verdict on the breach of contract claim.

⁴ We also note that, if the jury accepted Lewis' testimony regarding the contract having been negotiated, it could reasonably have determined that the rule of construing contractual language against its drafter was inapplicable. In any event, that rule is to be used only as a "last resort" after "all conventional means of contract interpretation" have failed to indicate the intent of the parties. *Klapp, supra* at 472.

IV

We need not reach the argument of Lewis and WSP that there was insufficient evidence to establish damages for an excessive compensation claim because, as discussed in Part I of this opinion, there was sufficient evidence to establish a general breach of fiduciary duty claim with regard to Lewis.

V

Lewis and WSP have not established that the trial court abused its discretion, *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003), by denying their motion for a new trial. Their argument as to the great weight of the evidence is flawed because it presupposes that the jury's verdict was based on a finding of excessive compensation while the verdict against Lewis could have been based on an independent finding of a general breach of fiduciary duty and the verdict against WSP was based on a breach of contract claim. Also, contrary to the position of Lewis and WSP, there is no basis for finding the jury's verdict ambiguous or inconsistent, particularly as we are required to make every effort to reconcile even jury verdicts that are seemingly inconsistent. *Kelly v Builders Square, Inc*, 465 Mich 29, 41; 632 NW2d 912 (2001). On its face, the jury verdict form was clear in asking for damages separately with regard to the claim against Lewis and the claim against WSP. That the jury awarded the same amount of damages against both parties does not make its verdict inconsistent or ambiguous.

VI

Finally, Lewis and WSP argue that the trial court erred by failing to give certain proposed jury instructions. We review claims of instructional error de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002).

We conclude that the trial court erred with regard to the breach of fiduciary duty claim against Lewis by failing to give any instruction on ratification in response to the request for such an instruction. The trial court's jury instructions included no mention of the possibility of ratification of the consulting agreement by independent directors precluding the breach of fiduciary duty claim. MCL 450.1545a(1)(b) and (2) allow a transaction involving a corporation and an interested director to be approved by a vote of the independent directors. In such a circumstance, a breach of fiduciary duty claim is not available against the interested director. *Camden v Kaufman*, 240 Mich App 389, 393-396; 613 NW2d 335 (2000). In this case, there was a direct conflict in the testimony regarding whether Chioini, an independent director, voted to extend the consulting agreement past June 1998. Given this conflict in the testimony and the existence of arguable grounds for questioning Chioini's testimony in this regard, we conclude that it would be inconsistent with substantial justice, *Cox, supra* at 8, to fail to grant relief based on this instructional error. Thus, we reverse the jury's verdict on the breach of fiduciary duty

claim and remand for a new trial as to that claim.⁵ However, this presents no basis for disturbing the verdict on the breach of contract claim against WSP, because that claim did not involve an issue of ratification of the consulting agreement, but rather whether that agreement was violated.

The trial court did not err by declining to instruct the jury on estoppel, including in relation to tax filings by Rockwell. Given that Lewis was the chairman of Rockwell at the relevant times, Lewis and WSP could not have justifiably relied on Rockwell's acts or omissions with regard to the consulting agreement in which Lewis was an interested party. See *West American Ins Co, supra*.

The trial court did not err in failing to give the proposed instruction regarding the statute of limitations because it is plain that any claim in this case did not accrue until 1998, when the first payment was made in relation to the consulting agreement, thus bringing plaintiff's action within the three-year period of limitation that Lewis and WSP assert is applicable.

The trial court also properly refused to give the instructions sought by Lewis and WSP as to Chioini's role as a director. First, an instruction on Chioini's fiduciary duties was unwarranted because this would be irrelevant to whether Lewis breached his fiduciary duties or whether WSP breached the consulting agreement. Also, a proposed instruction as sought by Lewis and WSP that Chioini voted to extend the consulting agreement would have improperly removed a disputed factual issue from determination by the jury.

Finally, Lewis and WSP waived their argument regarding their proposed jury instruction number nineteen, because their counsel stated below that he agreed that the trial court could "dispense" with that instruction. See *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001) (discussing waiver as involving intentional relinquishment of a known right).

In sum, we affirm the jury's verdict against WSP on the breach of contract claim, but reverse the verdict against Lewis on the breach of fiduciary duty claim and remand for a new trial as to that claim.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Bill Schuette

/s/ Mark J. Cavanagh

/s/ Helene N. White

⁵ In light of this conclusion, we need not reach appellants' argument concerning the jury instructions on reasonable compensation.